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No. 89-504

In the Supreme Court of the United States

OCTOBER TERM, 1989

LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MARILYN FINKELSTEIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether, in an action under 42 U.S.C. 405(g) for judicial review of the final decision of the Secretary of Health and Human Services denying a claim for Social Security disability benefits, the Secretary may appeal an order of the district court that rejects the legal basis for the Secretary's decision and, as a consequence, remands the cause to the Secretary for a rehearing under a different legal standard.

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OPINIONS BELOW

The opinion of the court of appeals, as amended by order dated May 19, 1989 (Pet. App. 1a-12a), is reported at 869 F.2d 215, and the opinion of Judge Becker dissenting from the denial of rehearing en banc (Pet. App. 23a-24a) is reported at 869 F.2d 220. The opinion of the district court (Pet. App. 13a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1989 (Pet. App. 19a-20a), and a petition for rehearing was denied on May 24, 1989 (Pet. App. 21a-22a). By order dated August 9, 1989 Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including September 21, 1989. The petition was filed on that date and was granted on January 22, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1291 and Section 205(g) of the Social Security Act, as codified at 42 U.S.C. 405(g), are set forth in an Appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

1. Respondent is the widow of a wage earner who died on August 27, 1980, while fully insured under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.* On November 25, 1983, respondent applied for widow's disability benefits under Title II.

The statutory standard of disability for the widow, widower, or surviving divorced spouse of a wage earner [1] is different from and more stringent than that for the wage earner. In the case of a wage earner, the Social Security Act provides that the term "disability" means the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1)(A). The Act further provides that a wage earner shall be determined to be under a disability only if his impairment is "of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy" (42 U.S.C. 423(d)(2)(A)). By contrast, under 42 U.S.C. 423(d)(2)(B), which was enacted in 1968,[2] a surviving spouse shall not be determined to be disabled unless his or her impairment is "of a level of severity which under regulations prescribed by the Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity." See

[1] For convenience, we shall hereafter refer to this class of persons as "surviving spouses."

[2] Social Security Amendments of 1967, Pub. L. No. 90-248, § 158(b), 81 Stat. 868.

Sullivan v. *Zebley*, No. 88-1377 (Feb. 20, 1990), slip op. 14-15.

The regulations implementing the latter statutory section, which were promulgated soon after passage of 42 U.S.C. 423(d)(2)(B) in 1968,[3] provide that a surviving spouse's impairment is deemed to be of sufficient severity to preclude gainful activity only if it meets or equals the severity of an impairment included in the Listing of Impairments in App. 1 to 20 C.F.R. Pt. 404, Subpt. P. See 20 C.F.R. 404.1525(a), 404.1577, 404.1578(a). Thus, under the regulations prescribed by the Secretary, a surviving spouse's impairment is evaluated solely on the basis of the medical severity of that impairment. The Secretary does not consider any further limitations on the surviving spouse's ability to work that may result from the adverse effects of age, education, or work experience, as he would in the case of a wage earner. 20 C.F.R. 404.1577, 404.1578(a); see *Sullivan* v. *Zebley*, slip op. 15; *Bowen* v. *Yuckert*, 482 U.S. 137, 149 n.7 (1987); *id.* at 163-164 & n.3 (Blackmun, J., dissenting).[4]

2. Respondent's application for surviving spouse's disability benefits under 42 U.S.C. 423(d)(2)(B) was denied at all four levels of the administrative process on the ground that her coronary condition did not meet or equal an impairment contained in the Listing. Pet. App. 16a.[5] After respondent exhausted her administrative

[3] 33 Fed. Reg. 11,749, 11,751, 11,755 (1968), adding 20 C.F.R. 404.1504, 404.1506(a)(1).

[4] The Senate Report on the 1968 amendments that added 42 U.S.C. 423(d)(2)(B) stated that "[t]he determination of disability in the case of a widow or widower would be based solely on the level of severity of the impairment"; that such a determination "would be made without regard to nonmedical factors such as age, education, and work experience, which are considered in disabled worker cases"; and that "individuals whose impairments do not meet this level of severity may not in any case be found disabled." S. Rep. No. 744, 90th Cong., 1st Sess. 49-50 (1967).

[5] The initial determination of disability is made by a state agency acting under the authority and supervision of the Secretary. 42

remedies through the Appeals Council, she sought judicial review of the Secretary's final decision, pursuant to 42 U.S.C. 405(g), in the United States District Court for the District of New Jersey.

The district court upheld, as supported by substantial evidence, the Secretary's decision that respondent's coronary impairment did not meet or equal an impairment contained in the Listing. Pet. App. 15a-16a. It further held, however, that the Secretary may not deny a surviving spouse's claim for disability benefits on that basis alone, but instead must make an individualized determination of the functional impact of the impairment on the claimant in order to determine whether she in fact retains sufficient residual functional capacity to perform any gainful activity. *Id.* at 17a-18a. The effect of this ruling was to invalidate the Secretary's longstanding regulations to the extent that they require an applicant for surviving spouse's disability benefits to show an impairment that meets or equals a listed impairment.[6] The

U.S.C. 421(a); 20 C.F.R. 404.1503. If the claimant is dissatisfied with the initial determination, he may request a de novo reconsideration by the state agency. 20 C.F.R. 404.909(a). If the claim is denied on reconsideration, the claimant may then request a de novo hearing before an administrative law judge (ALJ) in the Office of Hearings and Appeals of the Social Security Administration. 42 U.S.C. 405(b)(1) (1982 & Supp. IV 1986); 20 C.F.R. 404.929. Finally, the claimant may seek review by the Appeals Council. 20 C.F.R. 404.967. See *Bowen* v. *Yuckert*, 482 U.S. at 142; *Bowen* v. *City of New York*, 476 U.S. 467, 472 (1986). If the Appeals Council denies review, or grants review and affirms the denial of benefits, the claimant may then seek judicial review of that "final decision" pursuant to 42 U.S.C. 405(g). 20 C.F.R. 404.981. The Act contains no provision for the Secretary to seek judicial review of a decision by his own Appeals Council in favor of the claimant.

[6] A claimant's "residual functional capacity" is "what [the claimant] can still do *despite* [his] impairments" (20 C.F.R. 404.1545) (emphasis added). Under governing regulations, the Secretary measures this capacity only for the purpose of determining, at steps four and five of the sequential evaluation process utilized for wage earners, whether a claimant whose impairment does not meet or

court therefore "directed" the Secretary "to inquire whether [respondent] may or may not engage in any gainful activity, as contemplated by the Act" (*id.* at 18a), and ordered "that the matter be remanded to the Secretary for further proceedings in accordance with [the] Court's opinion." *Id.* at 25a.

3. The Secretary appealed the district court's order. He defended the validity of the regulations requiring an applicant for surviving spouse's disability benefits to show an impairment that meets or equals the Listing, and argued that the district court therefore should have affirmed the Secretary's final decision because the court correctly upheld, as supported by substantial evidence, the Secretary's finding that respondent did not have such an impairment. Pet. App. 2a-4a.[7] On March 3, 1989, the

equal a listed impairment nevertheless is disabled because he cannot perform his past work or other work in the national economy, in light of his age, education, and work experience. 20 C.F.R. 404.1520(e) and (f), 404.1545(a), 404.1561; *Bowen v. City of New York*, 476 U.S. at 471. Because the eligibility of a surviving spouse is based on the severity of the impairment itself, and not on what the claimant can do despite that impairment, the regulations do not provide for an assessment of a surviving spouse's residual functional capacity.

[7] In *Sullivan* v. *Zebley*, this Court considered the Secretary's regulations requiring a claimant for children's disability benefits (under Title XVI of the Social Security Act, 42 U.S.C. 1381 *et seq.* (1982 & Supp. IV 1986)) to show an impairment that meets or equals an impairment in the Listing. The Court held that the regulations were inconsistent with the relevant statutory provision governing children's benefits, 42 U.S.C. 1383c(a)(3)(A) (1982 & Supp. IV 1986). Slip op. 19. However, in so ruling, the Court expressly distinguished the statutory provision governing surviving spouse's benefits under Title II. See slip op. 14-15. *Zebley* thus in no way moots the underlying legal issue that formed the basis of the Secretary's appeal in this case. Indeed, the decision in *Zebley* reinforces our position on the merits in this case—that the district court erred in holding invalid the Listing-only rule for surviving spouses.

court of appeals dismissed the Secretary's appeal for lack of jurisdiction, holding that the district court's order was an interlocutory order, not a "final decision," for purposes of 28 U.S.C. 1291. Pet. App. 1a-12a, 19a-20.

The court of appeals first noted its previous articulation of a general rule that " 'remands to administrative agencies are not ordinarily appealable under section 1291,' " because "[s]uch a remand is typically an interlocutory step in the adjudicative process and, therefore, not a final order." Pet. App. 4a (quoting *United Steelworkers, Local 1913* v. *Union R.R.* 648 F.2d 905, 909 (3d Cir. 1981)). The court acknowledged that its prior decisions established an exception to that general rule for "cases in which an important legal issue is finally resolved and review of that issue would be foreclosed 'as a practical matter' if an immediate appeal were unavailable." Pet. App. 4a-5a. But after reviewing those decisions (*id.* at 7a-9a), the court found that exception inapplicable here, because, in the court's view, " 'it is not inexorably so' " that the legal ruling on which the district court's order was based would escape appellate review. *Id.* at 9a (quoting *Bachowski* v. *Usery*, 545 F.2d 363, 373 (3d Cir. 1976)). See generally Pet. App. 9a-12a. The court reasoned that the question whether the district court had made an error of law would be subject to review by the court of appeals if events subsequent to the district court's order at issue here unfolded in a particular way, namely: (a) if the Secretary, after considering respondent's residual functional capacity on remand, made an individualized determination that respondent is not precluded from engaging in any gainful activity; (b) if respondent sought judicial review of that decision of the Secretary; (c) if the district court reversed the Secretary's new decision and ordered an award of benefits; and (d) if the Secretary appealed that subsequent order of the district court to the court of appeals. *Id.* at 9a-11a; see also *id.* at 7a.

The court candidly proceeded on the assumption that the Secretary would be denied any opportunity for appellate review of the district court's legal ruling if events did not unfold in the manner just described—specifically if, on remand, the ALJ or Appeals Council was required to find respondent disabled and award her benefits under the district court's view of the controlling standards. Pet. App. 9a-10a, 11a. But the court concluded that this possible preclusion of any opportunity for the Secretary to obtain appellate review of the central legal issue in the case was "of no more significance" than it was in another Third Circuit case (*Brotherhood of Maintenance of Way Employees* v. *Consolidated Rail Corp.*, 864 F.2d 283 (1988)) in which it had dismissed an appeal even though the appellant might be deprived of any opportunity to challenge the legal ruling that led to the remand. Pet. App. 11a.

The court of appeals also acknowledged that, in a number of prior cases, it had found appellate jurisdiction over similar district court orders on the theory that the order constituted a final rejection of the agency's position that under the governing law, no further administrative hearing or other proceedings were required. Pet. App. 7a-9a, 12a. But the court found that rationale inapposite in this case because, in its view, the legal issue presented here is not whether the governing statute or regulations require a hearing, but whether an additional factor (respondent's residual functional capacity) must be considered by the Secretary before he makes a final administrative adjudication of the benefits claim. *Id.* at 12a. Finally, although the appeal in this case was taken not by respondent but by the Secretary, who was seeking reinstatement of his final decision, the court of appeals found it significant that *respondent* "ha[d] no vested right in anything" and that the district court's order therefore "did not take away something which she had already been given," but rather "postponed final disposi-

tion in her case until the Secretary had considered an additional factor." *Ibid.*[8]

4. The Secretary's petition for rehearing en banc was denied, with three judges dissenting. Pet. App. 21a-22a. Judge Becker, who was a member of the panel, explained his vote for rehearing en banc in a statement joined by Judges Sloviter and Stapleton. *Id.* at 23a-24a. Judge Becker stated that he had joined the panel's opinion because he felt bound to do so by the Third Circuit's decision in *Bachowski* v. *Usery*, 545 F.2d 363 (1976), even though *Bachowski* "seems inconsistent at least with the spirit of [the Third Circuit's] later jurisprudence." Pet. App. 23a. But Judge Becker explained that if free to do so, he would follow the reasoning of the recent decision in *Occidental Petroleum Corp.* v. *SEC*, 873 F.2d 325, 328-332 (D.C. Cir. 1989), and hold that the court of appeals had appellate jurisdiction in this case. Judge Becker elaborated (Pet. App. 23a):

> In [*Occidental Petroleum*], Judge [Douglas] Ginsburg, speaking for the court, expressed the view that Congress did not intend that the final order rule place an agency in a position of dependence upon the self-interest of others in order to get review of a legal decision that dictates the standards and procedures to be applied by the agency in making its decisions. Here, as in *Occidental*, the Secretary is between the proverbial rock and a hard place. If the Secretary, bound by the district court's opinion, grants benefits on remand to [respondent], he cannot appeal. If the Secretary does not grant benefits on remand, whether or not the legal issue will be

[8] In light of its jurisdictional holding, the court of appeals did not express an opinion on the district court's ruling that "a widow whose impairment does not meet or equal any in the listing is entitled to have her residual functional capacity considered." Pet. App. 3a-4a n.4. But the court did note its prior holding that "a stricter standard does apply in widow's disability cases." *Id.* at 4a n.4 (citing *Smith* v. *Schweiker*, 671 F.2d 789, 790 (3d Cir. 1982)).

> reviewed depends on whether [respondent] decides to press an appeal.[9]

SUMMARY OF ARGUMENT

The court of appeals had jurisdiction of the Secretary's appeal under 28 U.S.C. 1291. The district court's order in this case was a "final decision" for purposes of that provision because it constituted a final rejection of the particular decision of the Secretary that was before the district court on judicial review.

1. The jurisdiction of the court of appeals is established by the text and structure of 42 U.S.C. 405(g). That provision makes it clear that the district court's decision here—which rejected on the merits the legal standard underlying the Secretary's decision—is a "judgment" that is "final" and subject to appellate review even though, as an aspect of its relief, the court remanded the cause to the Secretary for rehearing under a different legal standard. That conclusion is reinforced by Congress's identification in Section 405(g) of certain other remands that are interlocutory in nature and that do not constitute final judgments. This Court's decision in *Sullivan* v. *Hudson*, 109 S. Ct. 2248 (1989), relied on by respondent, is not to the contrary, since it dealt only with the very different question of an award of attorney's fees, under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, for legal services rendered to a claimant on remand.

2. The conclusion that 42 U.S.C. 405(g) renders the district court's order appealable is strongly supported by established principles governing judicial review of agency action and the appealability of district court orders under 28 U.S.C. 1291. Indeed, this Court has previously granted review on the merits of court of appeals

[9] On September 7, 1989, the district court, with respondent's consent, stayed its order of remand pending this Court's disposition of the instant petition for a writ of certiorari.

decisions in situations indistinguishable from that presented here. And it has itself reviewed decisions under the Hobbs Act, 28 U.S.C. 2341 *et seq.*, which authorizes such review of "final" judgments of the courts of appeals, 28 U.S.C. 2350, in instances in which the court of appeals' judgment has included a remand to the agency for further proceedings.

This Court has recognized in a variety of instances that Section 1291 is addressed to the maintenance of a healthy legal system, that it must be given a practical and not a technical construction, and that it is therefore not limited to orders that terminate the proceedings in all respects. Instances in which appeals have been allowed include cases involving "collateral orders," *e.g.*, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and cases in which, as a practical matter, there would be no further litigation of the issue in the federal system, *e.g.*, *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 7 (1983).

This case differs from prior cases in which the Court has considered the appealability question because the order at issue here was not entered in the course of ordinary civil or criminal litigation. It was entered, instead, in the context of judicial review of final agency action. In that context, when a district court holds an agency's decision unlawful, a coordinate Branch of government is immediately aggrieved. Moreover, the nature of judicial review of agency action is such that the district court's judgment effectively ends the judicial proceeding on the merits; in this case, the matter before the district court was the agency decision under review, not respondent's underlying claim for benefits. The division of functions between agency and reviewing court leaves the resolution of that claim to the agency.

Even if the proceedings before the district court and those before the Secretary are viewed as aspects of a broader controversy over respondent's claim to benefits,

the principles informing the "collateral order" doctrine support appellate review here. The Secretary's appeal of the district court order does not interfere with any on-going proceedings in the district court or undermine the independence of the district judge. On the contrary, allowance of an appeal is necessary to vindicate the special role and distinct responsibilities of the Secretary, who is the Executive Branch officer responsible for administering the Social Security Act.

Indeed, the Secretary's right to appeal is consistent with the three factors the Court has identified in applying the collateral order doctrine. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). First, the district court has conclusively determined a disputed question of law. Second, the district court order is "completely separate" from the merits in the relevant sense because there will be *no* further development of legal or factual issues by the district court at a trial—the further proceeding contemplated will, instead, take place in another Branch under a different legal standard—and because the issue resolved by the district court cannot be reconsidered by the Secretary on remand. Finally, the district court's ruling is not effectively reviewable on appeal from a later judgment because, if respondent prevails on remand or does not pursue her claim, the Secretary will be unable to appeal from that decision.

ARGUMENT

THE COURT OF APPEALS HAD JURISDICTION OF THE SECRETARY'S APPEAL

Section 1291 of Title 28 provides that "[t]he courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts * * * except where a direct review may be had in the Supreme Court." This provision is a descendant of Section 22 of the Judiciary Act of 1789, ch. 20, 1 Stat. 84, which provided that "final decrees and judgments" in civil actions in a district court could be reexamined and affirmed or reversed by the circuit court. For these purposes, a final judgment is normally deemed not to have been entered " 'until there has been a decision by the District Court that "ends the litigation on the merits and leaves nothing for the court to do but execute its judgment." ' " *Midland Asphalt Corp.* v. *United States*, 109 S. Ct. 1494, 1497 (1989) (quoting *Van Cauwenberghe* v. *Biard*, 108 S. Ct. 1945, 1949 (1988), and *Catlin* v. *United States*, 324 U.S. 229, 233 (1945)).

The Court has recognized, however, that under Section 1291, "it is a final *decision* that Congress has made reviewable," not a final judgment. *Stack* v. *Boyle*, 342 U.S. 1, 12 (1951) (opinion of Jackson, J.). As a result, " 'a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case.' " *Mitchell* v. *Forsyth*, 472 U.S. 511, 524 (1985) (quoting *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152 (1964)). And in determining whether a particular type of order is immediately appealable under Section 1291, the requirement of finality must be given a "practical rather than a technical construction." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

The district court's order in this case is a "final decision" for purposes of 28 U.S.C. 1291 because it constituted a final rejection of the particular decision of the

Secretary that was before the district court on judicial review; the district court's decision therefore terminated the relevant judicial proceedings. The administrative decision before the court denied respondent's application for surviving spouse's disability benefits on the ground that she had not satisfied the pertinent regulatory requirement (that her impairment meet or equal an impairment in the Listing). The district court sustained, as supported by substantial evidence, the Secretary's finding that respondent had not satisfied that requirement. Pet. App. 16a. But instead of affirming the Secretary's decision based on that determination, in accordance with governing regulations, the court held that the Secretary must inquire into whether respondent is in fact unable to perform any gainful activity, taking into account her residual functional capacity. *Id.* at 17a-18a, 25a.

Neither the court of appeals nor respondent disputes that the district court's order effectively invalidated the Secretary's regulations in this case. Compare *Heckler* v. *Campbell*, 461 U.S. 458, 465-466 (1983). A district court order having that effect is a "final decision" from which the Secretary may take an appeal pursuant to 28 U.S.C. 1291. The Secretary is not divested of his right to appeal the order simply because the district court, in addition to and as a consequence of those rulings, remanded the cause to the Secretary for a rehearing under different legal standards that the court itself imposed. The subject of the Secretary's appeal is the district court's rejection of the final decision of the Secretary that was before the court on judicial review, not the court's further action in remanding the matter to the Secretary to render a *new* decision. This case therefore differs from those in which a court remands a matter to an agency for the receipt of new evidence *before* the court addresses the merits of the particular administra-

tive decision that is pending on judicial review.[10] A remand of the latter sort occurs at an interlocutory stage of the judicial proceeding; it is nonappealable because it precedes the court's final adjudication of the subject of the civil action (the validity of the administrative decision). An appeal at that stage could challenge only the remand itself, not any legal rulings by the court on the merits of the administrative decision.

The Secretary's right of appeal in circumstances like those presented here is supported by the text and structure of 42 U.S.C. 405(g), as well as by the principles that govern judicial review of agency action and inform this Court's construction of 28 U.S.C. 1291.

I. THE TEXT AND STRUCTURE OF 42 U.S.C. 405(g) ESTABLISH THAT THE DISTRICT COURT'S ORDER IS A FINAL JUDGMENT FROM WHICH THE SECRETARY MAY APPEAL UNDER 28 U.S.C. 1291

The text and structure of 42 U.S.C. 405(g) establish that the court of appeals had jurisdiction of the Secretary's appeal in this case. Indeed, Congress has specified in Section 405(g) that a district court decision such as that at issue here is a "judgment" that is "final" and subject to appellate review "in the same manner as the judgment in other civil cases," even though the court, as an aspect of its relief, remands the cause to the Secretary for a hearing under different legal or evidentiary standards. This conclusion is reinforced by Congress's identification in Section 405(g) of certain other remands that do *not* follow from the court's ruling on the validity of the Secretary's decision, but instead are intended to furnish an opportunity for supplementation or clarification of the administrative record and decision. The Secretary, like the claimant, may not appeal the latter type of order under 28 U.S.C. 1291 because it does not dispose of the merits of the cause of action for judicial review of the Secretary's decision. The text of Section 405(g) thus furnishes a bright line between those district court orders the Secretary may appeal and those he may not. That bright line should be given effect in this case.

A. Section 405(g) establishes a simple, expeditious, and carefully tailored procedure by which claimants may invoke the jurisdiction of district courts in Social Security cases. That procedure serves to circumscribe the role of the courts in matters arising under the Social Security Act and, correspondingly, to preserve and respect the primary jurisdiction of the Secretary in administering the massive benefit programs established by the Act—both in the formulation of broad policies (see 42 U.S.C. 405(a); *Bowen* v. *Yuckert*, 482 U.S. at 145) and in the adjudication of individual claims for benefits. *Weinberger* v. *Salfi*, 422 U.S. 749, 765-767 (1975).

Consistent with this legislative scheme, Section 405(g) does not create an ordinary civil cause of action against the United States for a money judgment in the amount of benefits allegedly owing under the Social Security Act. Nor does the statute authorize a trial de novo of the sort that would be conducted in the adjudication of an ordinary civil cause of action. To the contrary, Section 405(g) authorizes a special and limited form of civil action: an action for judicial review of the *Secretary's* final decision on the plaintiff's claim for benefits. The court's review and decision must be based on the record developed by and presented to the Secretary during the four-stage administrative review process. It is during that administrative process, not on judicial review, that the claimant has an opportunity for a de novo evidentiary hearing. 42 U.S.C. 402(b)(1) (1982 & Supp. IV 1986). As a result, the subject matter of the civil action

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[10] The prior Third Circuit cases cited by the panel below in which jurisdiction under 28 U.S.C. 1291 was found lacking involved appeals from such orders, which remanded the case to the Secretary pursuant to the sixth sentence of 42 U.S.C. 405(g), discussed at pages 21-22, *infra*. See Pet. App. 5a, citing *Mayersky* v. *Celebrezze*, 353 F.2d 89 (3d Cir. 1965), and *Marshall v. Celebrezze*, 351 F.2d 467 (3d Cir. 1965).

authorized by 42 U.S.C. 405(g) is not the plaintiff's underlying monetary claim for benefits under the Social Security Act, but rather the validity of the Secretary's final decision disposing of that claim.

This character of a civil action under Section 405(g) is demonstrated by the statutory text in a number of respects.[11] The first sentence of Section 405(g) provides that "[a]ny individual, after any final decision of the Secretary made after a hearing to which he was a party, * * * may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow." The third sentence requires the Secretary, as part of his answer to the complaint, to "file a certified copy of the transcript of the [administrative] record including the evidence upon which the findings and decision complained of are based." These two sentences confirm that (i) the subject of the civil action is the "final decision" (and supporting findings) of the Secretary that the plaintiff has "complained of," (ii) the scope of the civil action is limited to "a review of such decision," and (iii) the only record on which the court may base its review is the record relied upon by the Secretary and furnished by him to the court.[12]

The fourth sentence of Section 405(g) both confers adjudicatory power on the court and limits that power. This sentence states that the district court "shall have

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[11] Section 405(g) is reproduced in an appendix to this brief. In that appendix, we have numbered the sentences of Section 405(g) sequentially, setting off by brackets the numerical designations we have added. See App., *infra*, 1a-2a.

[12] Consistent with these provisions and the language in the fourth sentence of Section 405(g) authorizing a district court to enter a judgment only "upon the pleadings and transcript of the record," the district courts typically decide cases under Section 405(g) on cross-motions for summary judgment or a substantially equivalent procedure. See 4 *Social Security Law and Practice* §§ 56:26-56:31 (1987).

power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." This language aptly describes what the district court did in this case: the court "affirm[ed]" the Secretary's decision insofar as it found that respondent did not satisfy the requirement of the governing regulations by showing an impairment that meets or equals the Listing; the court "modif[ied]" or "revers[ed]" the Secretary's decision insofar as it denied respondent's claim on that basis; and the court then "remand[ed] the cause for a rehearing," in which the Secretary must apply a legal standard other than the one set forth in the regulations. The text and background of Section 405(g) indicate that the Secretary may appeal such an order.

As an initial matter, Congress's use of the term "judgment" in the fourth sentence of Section 405(g) to describe the disposition that the district court is empowered to make indicates in itself that the Secretary may appeal such an order under 28 U.S.C. 1291. The word "judgment" is a term of art that typically connotes the final disposition of a case, see 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 54.02, at p. 54-22 & nn. 2, 3 (2d ed. 1988), and an order that so "ends the litigation on the merits" may be appealed by the party aggrieved, pursuant to 28 U.S.C. 1291. *Catlin* v. *United States*, 324 U.S. at 233.

There is, moreover, particular reason to believe that Congress understood when it enacted Section 405(g) in 1939[13] that the term "judgment" connotes an order from which an appeal lies. Rule 54(a) of the Federal Rules of Civil Procedure expressly provides that the term "judgment" "includes a decree and any order from which an appeal lies." The Federal Rules, including Rule 54(a), became effective in 1938 (Fed. R. Civ. P. 86(a); 308

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[13] Act of Aug. 10, 1939, ch. 666, § 201, 53 Stat. 1368.

U.S. at 653, 732, 766), less than one year before Congress enacted Section 405(g). Rule 1 of the Civil Rules provides, as it did in 1938 (308 U.S. at 663), that the Rules govern the procedure "in all suits of a civil nature," language necessarily encompassing the suits under the Social Security Act that Congress authorized when it enacted Section 405(g) in 1939. See *Califano* v. *Yamasaki*, 442 U.S. 682, 700 (1979). Furthermore, under the Rules Enabling Act, the Rules did not take effect until the close of the 1938 Session of Congress, the Session in which they had been reported to Congress by the Attorney General. See Act of June 19, 1934, ch. 651 § 2, 48 Stat. 1064, codified as amended at 28 U.S.C. 2072-2074. It is therefore reasonable to conclude that Congress intended the term "judgment" in Section 405(g) to have the same meaning as that term had recently and definitively been given under the Rules governing procedure in civil actions generally. See *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 14-16 (1941). Thus, the straightforward reading of the fourth sentence of Section 405(g) is that a district court has power to enter a "judgment" modifying or reversing the decision of the Secretary, and that the judgment is an appealable order even if the court, as a consequence of its legal ruling, also remands the cause to the Secretary for a rehearing.

Any doubt on this question would appear to be eliminated by the eighth sentence of 42 U.S.C. 405(g). The eighth sentence provides that "[t]he judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions." Because the fourth sentence of Section 405(g) makes clear that the term "judgment" encompasses an order modifying or reversing the Secretary's decision whether or not the court also remands the cause to the Secretary, the existence of a remand does not detract from the "final[ity]" of the judgment for purposes of the eighth sentence. As noted above, it is undisputed that a final judgment is an appealable "final decision"

within the meaning of 28 U.S.C. 1291. See *Midland Asphalt Corp.* v. *United States*, 109 S. Ct. at 1497.

In any event, the eighth sentence further states that a judgment under 42 U.S.C. 405(g) "shall be subject to review in the same manner as a judgment in other civil actions." While the legislative history does not elaborate on this provision,[14] it apparently was intended only to clarify *where* an appeal of the district court's concededly final judgment may be taken, not *whether* an appeal lies. At the time Section 405(g) was enacted, the usual "manner" in which a party obtained review of a judgment in a civil action was by appeal to the court of appeals pursuant to what is now 28 U.S.C. 1291. But when a district court held a provision of the Social Security Act unconstitutional, review was by direct appeal to this Court, pursuant to the special jurisdictional statute passed in 1937, only two years before 42 U.S.C. 405(g) was enacted. Act of Aug. 24, 1937, § 2, ch. 754, 50 Stat. 752, 28 U.S.C. 1252 (1982); see, *e.g.*, *Fleming* v. *Nestor*, 363 U.S. 603, 604 (1960); *Bowen* v. *Owens*, 476 U.S. 340, 345 (1986).[15]

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[14] The House and Senate Reports on the 1939 amendments summarized the provisions of Section 405(g) in identical terms, without specific reference to the eighth sentence. The Reports explained the need for Section 405(g) by noting that the then-present provisions of the Act "[did] not specify what remedy, if any, is open to a claimant in the event his claim to benefits is denied by the [Social Security] Board," and that "[t]he provisions of this subsection are similar to those made for the review of decisions of many administrative bodies." H.R. Rep. No. 728, 76th Cong., 1st Sess. 43 (1939); S. Rep. No. 734, 76th Cong., 1st Sess. 52 (1939).

[15] This interpretation of the eighth sentence as relating to the court to which an appeal may be taken is supported by a section-by-section analysis prepared by the responsible House Subcommittee following enactment of the Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509. In describing Section 405(g), which was not amended by the 1977 amendments, the Subcommittee stated: "The judgment shall be final except that it shall be subject to review in the same manner as other civil actions; in a court of appeals and in the Supreme Court under certain circum-

Thus, the eighth sentence of Section 405(g) preserved the alternative avenues of appellate review,[16] and, read in connection with the fourth sentence, firmly establishes that the Secretary may appeal the district court's order here.

This conclusion is supported by the other provisions of Section 405(g) that describe the nature and scope of the civil action it authorizes. As explained above, those provisions make clear that it is not the underlying claim for benefits, but rather the particular final decision of the Secretary that the claimant has "complained of" in his action for judicial review, that is the subject of the civil action. Accordingly, where, as here, the district court enters an order holding that particular decision to have been erroneous and then remands to the Secretary for a rehearing, the court's order ends the relevant litigation on the merits. After the further proceedings on remand, the Secretary will render a *new* decision (based on new findings), in conformity with the legal rulings in the district court's order, and it is that *new* decision, not the one the district court previously set aside, that will be the subject of any further proceedings for judicial review that the claimant may institute under Section 405(g). Because the two rounds of judicial proceedings are conceptually and legally distinct (despite their relation to the same underlying claim for benefits), it is not surprising that Congress, in enacting Section 405(g), deemed the order that ends the first round to be a final judgment

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stances." Subcomm. on Social Security of the House Comm. on Ways & Means, 95th Cong., 2d Sess., *The Social Security Amendments of 1977: Brief Summary of Major Provisions and Detailed Comparison With Prior Law* 26 (Comm. Print 1977).

[16] Because the direct appeal statute was repealed by the Act of June 27, 1988, Pub. L. No. 100-352, § 1, 102 Stat. 662, the exclusive "manner" by which the Secretary now may obtain appellate review of the district court's order in a Social Security case is in the court of appeals, pursuant to 28 U.S.C. 1291.

that is "subject to review in the same manner as a judgment in other civil actions." [17]

B. Respondent ignores the fourth and eighth sentences of 42 U.S.C. 405(g), which speak directly to the appealability issue, and focuses instead (Br. in Opp. 22-27, 29-31, 52-55) on the sixth sentence. In her view, the sixth

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[17] A number of courts have held that a Social Security claimant may not take an appeal under 28 U.S.C. 1291 even from an order that remands the cause to the Secretary after reaching the merits of the Secretary's decision, since the claimant may seek judicial review of the new decision rendered by the Secretary on remand if that decision is adverse to him. *Bohms* v. *Gardner*, 381 F.2d 283 (8th Cir. 1967), cert. denied, 390 U.S. 964 (1968); *Beach* v. *Bowen*, 788 F.2d 1399 (8th Cir. 1986); *Farr* v. *Heckler*, 729 F.2d 1426 (11th Cir. 1984); *Howell* v. *Schweiker*, 699 F.2d 524 (11th Cir. 1983). In doing so, the courts were agreeing with the government's position in those cases that no appeal would lie.

Under the rationale presented in this part of our brief, which relies on the language of Section 405(g) deeming an order like that entered here to be a final judgment subject to appeal in the same manner as a judgment in other civil actions, such decisions may well be appealable by a claimant who could show that he was aggrieved by a ruling of law by the district court—*e.g.*, that if the court's ruling was in error he was entitled to outright reversal of the Secretary's decision. Such appeals, however, would surely be infrequent. (In this case, for instance, respondent did not cross-appeal from the district court's decision upholding the Secretary's determination that she did not show an impairment that met or equaled the Listing.) This is so for three reasons. First, the district court's order finding the Secretary's decision to have been legally erroneous and remanding the cause to the Secretary for further proceedings generally represents a substantial victory for a claimant. Second, any additional gains from a time-consuming appeal are unlikely, because a district court's conclusion that further proceedings should be conducted by the Secretary before there is a final resolution of the claim for benefits would be subject to only the most limited review by a court of appeals. Third, and by way of contrast, the claimant has a very good prospect of prevailing in the proceedings on remand: we have been informed by the Department of Health and Human Services that, following additional development of the record on remand, benefits are awarded in approximately 65% of Social Security cases that are remanded to the Secretary.

sentence suggests that *all* orders including a remand to the Secretary are interlocutory and nonappealable because in any remand to the Secretary governed by that sentence, the Secretary is required to file his amended findings and decision with the court. Respondent misapprehends the statutory scheme. In fact, the sixth sentence of Section 405(g) supports our position. It identifies district court orders that (in contrast to the category of orders characterized as a "judgment" and exemplified by that at issue here) are *not* appealable under 28 U.S.C. 1291 because they only remand the case to the Secretary (for the receipt of new evidence or for a comparably interlocutory undertaking) and do not reach the validity of the Secretary's decision on the merits.

The sixth sentence of Section 405(g) contains two distinct authorizations for the district court to order a remand to the Secretary in circumstances *other* than those encompassed by the fourth sentence—*i.e.*, other than those in which the court reaches the merits of the validity of the Secretary's decision. The first permits the district court, "on motion of the Secretary made for good cause shown before he files his answers," to remand the case to the Secretary for "further action." This mechanism affords the Secretary an opportunity to respond to new evidence or allegations that have come to light since the Appeals Council rendered its decision denying the claim. It also permits the Secretary to correct deficiencies in the record or in his findings and decision that are noticed during preparation of the defense of the administrative decision. Compare *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 372-373 (1939).

The other authorization in the sixth sentence permits the court, at any time, to order that "additional evidence" be taken before the Secretary, but only if there is a showing of "new" and "material" evidence and of good cause for the failure to incorporate it into the record in a prior proceeding. Because all evidence bearing on the claim for benefits is received and weighed by the Secretary in the

first instance at all stages of the claims-adjudication process, it is consistent with the statutory scheme for a case pending on judicial review to be remanded to the Secretary for any necessary supplementation of the record —and for the Secretary to make additional or modified findings and to render a modified decision in light of that evidence—rather than to have the court itself receive and weigh the new evidence in the first instance.

The concluding portion of the sixth sentence of Section 405(g) requires the Secretary, on a remand covered by that sentence, to file with the court any additional or modified findings of fact or decision. Only after such reconsideration can the court properly pass on the validity of the Secretary's decision (as so modified) and affirm, modify, or reverse it. An order remanding a case to the Secretary pursuant to the sixth sentence that is entered *before* the court passes on the validity of the Secretary's decision is not a "final decision" and is therefore not subject to appeal by either the Secretary or the claimant under 28 U.S.C. 1291. *Cohen* v. *Perales*, 412 F.2d 44, 48 (5th Cir. 1969), rev'd on other grounds, 402 U.S. 389 (1971); *Dalto* v. *Richardson*, 434 F.2d 1018 (2d Cir. 1970), cert. denied, 401 U.S. 979 (1971); see also cases cited in note 10, *supra*.

Contrary to respondent's contention (Br. in Opp. 25, 27, 52-53), the order in the instant case was not governed by the limited remand authority in the sixth sentence of Section 405(g). Instead, the district court remanded the case to the Secretary only as a consequence of its holding on the merits that the Secretary's decision was legally erroneous. The Secretary therefore was entitled to appeal that order, as contemplated by the fourth and eighth sentences of Section 405(g). Other courts of appeals have consistently recognized the distinction between those orders remanding the entire cause to the Secretary as a consequence of the court's ruling that the Secretary's decision was unlawful, and pure remand orders, which

are governed by and subject to the distinct limitations in the sixth sentence of Section 405(g). *Aubeuf* v. *Schweiker*, 649 F.2d 107, 115-116 (2d Cir. 1981); *Carter* v. *Schweiker*, 649 F.2d 937, 942 (2d Cir. 1981); *Kane* v. *Heckler*, 731 F.2d 1216, 1220 (5th Cir. 1984); *Garfield* v. *Schweiker*, 732 F.2d 605, 610 n.8 (7th Cir. 1984); *Bauzo* v. *Bowen*, 803 F.2d 917, 926 (7th Cir. 1986); *Diorio* v. *Heckler*, 721 F.2d 726, 729 (11th Cir. 1983). See also J. Mashaw, *et al.*, *Social Security Hearings and Appeals* 130 (1978) [hereinafter *Social Security Hearings and Appeals*] (the fourth sentence of Section 405(g) differs from the sixth sentence and "gives the court discretion to remand in cases where the Secretary's decision is found to be unsupported by substantial evidence or where some legal error, substantive or procedural, has been committed"); H.R. Rep. No. 100, 96th Cong., 1st Sess. 13 (1979) (report on 1980 amendments to the sixth sentence of Section 405(g)).[18]

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[18] The volume *Social Security Hearings and Appeals*, upon which this Court has relied (see *Heckler* v. *Campbell*, 461 U.S. at 461 & n.2), is essentially identical to a report on the claims-adjudication process that led to the amendment of the sixth sentence of Section 405(g) in 1980. Center for Administrative Justice, *Final Report: Study of Social Security Administration Hearing System* 262 (Oct. 1977). Prior to 1980, the sixth sentence did not require a showing of good cause for a remand on the Secretary's motion and did not require a showing of materiality or good cause for the claimant's failure to introduce new evidence in a prior proceeding. See 42 U.S.C. 405(g) (1976). The report recommended (Center for Administrative Justice, *supra*, at 263-273) that the sixth sentence be amended to restrict such remands, in order to improve the quality of decision-making by the ALJs and the Appeals Council and to encourage timely production of evidence by claimants. Accord *Social Security Hearings and Appeals* at 130-136.

Congress adopted this recommendation by amending the first portion of the sixth sentence to read as it now does. Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 307, 94 Stat. 458. The House Report explained that this amendment of the sixth sentence was "not to be construed as a limitation of judicial remands currently recognized under the law in cases in which the

In respondent's view (Br. in Opp. 22-23, 29-32, 39-40), our submission that the order in this case is a final judgment subject to appeal by the Secretary is inconsistent with *Sullivan* v. *Hudson*, 109 S. Ct. 2248 (1989). That case, however, involved the award of attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(1)(A), not appellate jurisdiction. The Court held in *Sullivan* v. *Hudson* that proceedings before the Secretary on remand from a district court are sufficiently related to the civil action for judicial review under 42 U.S.C. 405(g) to permit a court, as part of an attorney's fees award under EAJA, to award fees for services rendered before the Secretary on remand. The Court held that a claimant is not, as a general matter, a prevailing party when a district court remands the matter to the Secretary, and it noted that under EAJA, an application for attorney's fees must be filed "within thirty days of final judgment in the action." 28 U.S.C. 2412(d)(1)(B). 109 S. Ct. at 2254-2255. In these circumstances, the Court noted that "for purposes of the EAJA," the claimant's status as a prevailing party and the final judgment in the civil action would often be dependent on the successful completion of the proceedings on remand to the Secretary. *Id.* at 2255.

The Court in *Sullivan* v. *Hudson* did not address the distinct question whether an order effectively setting aside the Secretary's decision and remanding the cause to the Secretary for redetermination is a final judgment for purposes of appealability under 28 U.S.C. 1291. Nor did it address the specific language in the fourth and eighth sentences of Section 405(g) that refers to such

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Secretary has failed to provide a full and fair hearing, to make explicit findings, or to have correctly apply [*sic*] the law and regulations." H.R. Rep. No. 100, *supra*, at 13. In at least the first and third of these examples, the district court has held the Secretary's decision unlawful, and those examples therefore would be covered by the fourth sentence of Section 405(g).

an order as a "judgment" that is "final" and "subject to review in the same manner as a judgment in other civil actions." There is, accordingly, no inconsistency between the holding in *Sullivan* v. *Hudson* that attorney's fees may be awarded after a remand and our submission here that the district court's order is a final judgment within the meaning of 42 U.S.C. 405(g) and is, for that reason, appealable under 28 U.S.C. 1291. See *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 199 (1988) (decision on merits is appealable under 28 U.S.C. 1291 even though recoverability of attorney's fees remains to be decided).[19]

[19] The Court took the Secretary to have conceded in *Sullivan* v. *Hudson* (apparently on the basis of the sixth sentence of Section 405(g)) that a district court order that includes a remand to the Secretary is not a final determination of the civil action and that the district court "'retains jurisdiction to review any determination rendered on remand.'" 109 S. Ct. at 2255, quoting Pet. Br. 16-17. The cited sentences of our opening brief, which essentially restated the respondent's position, were somewhat ambiguous. But we specifically argued in our reply brief (at 14-16) that an order holding the Secretary's decision unlawful and remanding for new proceedings under a different legal standard is governed *not* by the sixth sentence, but by the fourth and eighth sentences, which render the order a "final judgment" that effectively terminates the judicial proceedings for review of the particular decision of the Secretary before the court. We also stated (Reply Br. 16-17 n.8) our position that the Secretary may appeal such an order. As a result, our submission in *Sullivan* v. *Hudson*, taken as a whole, did not concede that an order such as that at issue here is a non-final decision, especially for purposes of the Secretary's right of appeal. Nor did it concede that, by operation of the sixth sentence of Section 405(g), the district court automatically retains jurisdiction to conduct plenary review of any new determination rendered by the Secretary after a remand that is not governed by that sentence. Although a district court may inherently retain some jurisdiction for limited purposes after a remand—*e.g.*, to assure that its prior mandate is carried out or to award attorney's fees if the claimant prevails in the proceedings on remand (109 S. Ct. at 2254-2255)—that jurisdiction does not confer power on the court to award relief "of a different kind or on a different principle." *Dugas* v. *American Surety Co.*, 300 U.S. 414, 428 (1937); *see*

II. THE RIGHT OF THE SECRETARY TO APPEAL IS SUPPORTED BY GENERAL PRINCIPLES GOVERNING THE CONSTRUCTION OF 28 U.S.C. 1291 AND THE SCOPE OF JUDICIAL REVIEW OF AGENCY ACTION

The conclusion that 42 U.S.C. 405(g) renders the district court's order in this case a final, appealable judgment is strongly supported by established principles governing judicial review of agency action and the appealability of district court orders under 28 U.S.C. 1291 generally. Indeed, Section 405(g) is but a particular statutory expression of those general principles. The common and preferred practice, when a court finds agency action unlawful and sets it aside, is for the court to remand the matter to the agency for further proceedings. That practice limits judicial intrusion into the administrative process and assures respect for the autonomy and distinct responsibilities of the agency charged by Congress with administering the statute. It would be a perverse result if a court's inclusion of a remand to the agency in its order holding the agency's action unlawful were to *divest* the agency of its right to seek appellate review of the court's order, especially since such an order may have seriously adverse consequences for the agency and the public. Fortunately, although the Court has not specifically addressed the jurisdictional issue, the actual practice of the courts, including this Court, has been to entertain appeals in such cases.

Of particular relevance here, the Court previously has granted review and decided the merits in a Social Security case in which the district court held erroneous the Secretary's decision denying benefits and remanded for a new hearing. See *Richardson* v. *Perales*, 402 U.S. 389 (1971). Although the Court recited the facts of the

Chemical Leaman Tank Lines, Inc. v. *United States*, 446 F. Supp. 721, 724 (D.D.C. 1978) (three-judge court). Any such retention of jurisdiction therefore cannot cut off the Secretary's right to appeal the order insofar as it held his prior decision unlawful.

district court's ruling and remand, *id.* at 397-398, it did not discuss the jurisdictional issue. But because this Court's jurisdiction under 28 U.S.C. 1254(1) depended on whether the case was properly "in" the court of appeals under 28 U.S.C. 1291 (see *United States* v. *Nixon*, 418 U.S. 683, 690, 692 (1974))—and because the jurisdictional issue *was* extensively discussed by the court of appeals (*Cohen* v. *Perales*, 412 F.2d 44, 48-49 (5th Cir. 1969))—the Court presumably would have felt obligated to address the issue if it had reservations about the court of appeals' jurisdictional holding.[20] Consistent with *Perales*, which is virtually indistinguishable from this case, the courts of appeals have, until quite recently, been unanimous in their view that the Secretary may appeal such an order in an action under 42 U.S.C. 405(g).[21]

[20] Similarly, in *Traynor* v. *Turnage*, 485 U.S. 535 (1988), one of the appellate decisions before the Court was rendered on an appeal by the Administrator of Veterans Affairs from a district court order that held the Administrator's order unlawful and remanded to the Administrator for further proceedings. *Id.* at 540; see *McKelvey* v. *Walters*, 596 F. Supp. 1317, 1325 (D.D.C. 1984).

[21] See *Lopez Lopez* v. *Secretary of HEW*, 512 F.2d 1155, 1156 (1st Cir. 1975); *Colon* v. *Secretary of HHS*, 877 F.2d 148, 149-151 (1st Cir. 1989); *McGill* v. *Secretary of HHS*, 712 F.2d 28, 29-30 (2d Cir. 1983) (dictum), cert. denied, 465 U.S. 1068 (1984); *Souch* v. *Califano*, 599 F.2d 577, 578 n.1 (4th Cir. 1979) (but see *Harper* v. *Bowen*, 854 F.2d 678 (4th Cir. 1988) (dismissing appeal in particular circumstances)); *Gold* v. *Weinberger*, 473 F.2d 1376, 1378 (5th Cir. 1973) (but see *Haywood* v. *Bowen*, No. 88-1280 (Nov. 30, 1988), 862 F.2d 873 (1988) (Table) (dismissing appeal without discussing court's own prior decision in *Perales*)); *Edmond* v. *Secretary of HHS*, No. 89-3161 (6th Cir. Apr. 19, 1989); *Jamieson* v. *Folsom*, 311 F.2d 506, 507 (7th Cir.), cert. denied, 374 U.S. 487 (1963); *Crowder* v. *Sullivan*, No. 89-2681 (7th Cir. Mar. 5, 1990); *Gardner* v. *Moon*, 360 F.2d 556, 558 n.2 (8th Cir. 1966) (but see *McCoy* v. *Schweiker*, 683 F.2d 1138, 1141 n.2 (8th Cir. 1982) (en banc) (dictum)); *Stone* v. *Heckler*, 722 F.2d 464, 466-468 (9th Cir. 1983); *Ensey* v. *Richardson*, 469 F.2d 664 (9th Cir. 1972); *Paluso* v. *Mathews*, 573 F.2d 4, 7-8 (10th Cir. 1978) (Black Lung case); *Davidson* v. *Secretary of HHS*, No. 88-1472 (10th Cir. Oct. 12, 1989); *Pickett* v. *Bowen*, 833 F.2d 288, 290-291 (11th Cir. 1987); *Huie* v. *Bowen*, 788 F.2d 698, 701-703 (11th Cir. 1988) (but see *Jordan* v. *Heckler*, 721 F.2d 349 (11th Cir. 1983) (dismissing appeal without discussion of *Perales*, which was binding precedent in Eleventh Circuit); *Biddle* v. *Heckler*, 721 F.2d 1321 (11th Cir. 1983) (same)). Even prior to the earliest of these decisions—*Jamieson, Gardner and Perales*—several courts of appeals, without addressing the jurisdictional issue, entertained appeals in similar circumstances. See *Hobby* v. *Hodges*, 215 F.2d 754 (10th Cir. 1954); *Ewing* v. *Gardner*, 185 F.2d 781 (6th Cir. 1950); *Social Security Board* v. *Warren*, 142 F.2d 974 (8th Cir. 1944).

The courts of appeals also have entertained appeals in Medicare cases in the identical situation under 42 U.S.C. 1395oo(f), where the district court held erroneous the decision of the Provider Reimbursement Review Board and remanded the cause to the Board for further proceedings. See, *e.g.*, *Community Hospital of Roanoke* v. *HHS*, 770 F.2d 1257 (4th Cir. 1985); *Daviess County Hospital* v. *Bowen*, 811 F.2d 338, 341-342 (7th Cir. 1987); *Edgewater Hospital, Inc.* v. *Bowen*, 857 F.2d 1123 (7th Cir. 1988); *Adams House Health Care* v. *Bowen*, 817 F.2d 587, 589 (9th Cir. 1987), vacated on other grounds, 485 U.S. 1018 (1988); *North Broward Hospital District* v. *Bowen*, 808 F.2d 1405, 1408 n.3 (11th Cir. 1987), vacated on other grounds, 485 U.S. 1018 (1988). See also *Gueory* v. *Hampton*, 510 F.2d 1222 (D.C. Cir. 1974) (following *Perales* in case involving remand to Civil Service Comm'n), reaffirmed in *Occidental Petroleum Corp.* v. *SEC*, 873 F.2d 325, 330-331 (D.C. Cir. 1989).

Equally significant are decisions involving judicial review of agency action directly in a court of appeals under the Hobbs Act, 28 U.S.C. 2341 *et seq.*, which authorizes this Court to review the "final judgment" of the court of appeals, 28 U.S.C. 2350.[22] The Court, without questioning the finality of the decision below or the Court's jurisdiction to review it, has on a number of occasions granted review of decisions in which the court of appeals held the particular agency action unlawful and remanded the cause to the agency for further proceedings. See, *e.g.*, *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 535-536 (1978); *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), re-

[22] 28 U.S.C. 2350 also permits this Court to review "[a]n order granting or denying an interlocutory injunction" under 28 U.S.C. 2349(b).

versing 761 F.2d 714, 725 (D.C. Cir. 1985). The Court should not "disregard the implications of an exercise of judicial authority assumed to be proper for [many] years." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 307 (1962). This Court's practical experience in the exercise of its authority to review "final judgment[s]" under 28 U.S.C. 2350 therefore weighs heavily in favor of recognizing a comparable authority in the courts of appeals under 28 U.S.C. 1291 to review district court decisions holding agency action unlawful and remanding to the agency for further proceedings. Moreover, the Court's articulation and application of the finality requirement of 28 U.S.C. 1291 and of similar statutes in other settings firmly buttress that result.

A. By its terms, Section 1291 is not limited to orders that constitute the final judgment in the case. It vests the courts of appeals with jurisdiction of appeals from "all final decisions" of the district courts, a category that includes more than final judgments. Congress's use of the inclusive term "all"[23] manifests an intent to reach every order that, in context, possesses the requisite "indicia of finality" (*Brown Shoe Co.* v. *United States*, 370 U.S. 294, 308 (1962)) with respect to the party aggrieved and the matter disposed of by the order. Accordingly, the Court has made clear that " 'a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case,' " *Mitchell* v. *Forsyth*, 472 U.S. at 524 (quoting *Gillespie* v. *United States Steel Corp.*, 379 U.S. at 152) and that the requirement of finality must be give a "practical rather than a technical construction." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. at 546. The principle of finality, in short, "is not a technical concept of temporal or physical termination," but "the means for achieving a healthy legal system." *Cobbledick* v. *United States*, 309 U.S. 323, 326 (1940). And " '[t]he considerations that determine finality are not abstractions but have reference to very real interests—not merely of the immediate parties, but, more particularly, those that pertain to the smooth functioning of our judicial system.' " *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. at 201 (quoting *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 69 (1948)).

[23] See *United States* v. *Monsanto*, 109 S. Ct. 2657, 2662 (1989).

Heretofore, the Court has considered the finality requirement of 28 U.S.C. 1291 only in the context of orders entered by a district court during or at the conclusion of ordinary civil or criminal litigation conducted entirely before the district court itself. In that setting, the "practical" rather than "technical" construction of Section 1291 has been most evident in the "collateral order" doctrine, which recognizes a small class of decisions immediately appealable under Section 1291 even though they do not terminate the proceedings in the district court. The class consists of decisions that "finally determine claims of right separate from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. at 546. See, *e.g.*, *Midland Asphalt Corp.* v. *United States*, 109 S. Ct. at 1497. Under the common formulation of the collateral order doctrine, an order is immediately appealable if it (1) "conclusively determine[s] the disputed question," (2) "resolve[s] an important issue completely separate from the merits of the action," and (3) is "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. at 468.

The Court has also made clear, however, that orders satisfying the three specific requirements of the collateral order doctrine do not constitute the only instances in which the principle of practical finality permits an appeal from an order that does not completely or formally terminate the litigation. For example, in *Moses*

H. Cone Memorial Hospital v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), the Court held that the court of appeals had jurisdiction of an appeal from a district court order staying proceedings pending resolution of a state-court suit raising the identical issue. The Court found the order to be a "final decision" because, as a practical matter, it meant there would be no further litigation of the issue in the federal forum, and the plaintiff therefore was "effectively out of court." 460 U.S. at 9-10.[24] The Court relied on its similar ruling in *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 n.2 (1962), that the court of appeals had jurisdiction over a district court order granting a stay under the *Pullman* abstention doctrine,[25] even though such an order is entered with the expectation that the federal litigation will resume if the plaintiff does not obtain relief in state court on state-law grounds. 460 U.S. at 9-10.[26]

B. This case differs from the cases just discussed. The order at issue here was not entered in the course of ordinary civil or criminal litigation, in which the courts determine all legal and factual issues in the first instance and in which the trial and reviewing bodies are both components of the judicial system. Instead, the order was entered in the different context of judicial review of final agency action, in which the primary adjudicatory proceedings take place before the agency, subject to judicial review limited in both scope and time. The formulation of principles of appellate jurisdiction in this

[24] The Court concluded, in the alternative, that the order was appealable as a collateral order. 460 U.S. at 11-12.

[25] *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941).

[26] See also *Brown Shoe Co.* v. *United States*, 370 U.S. at 307-311; *Forgay* v. *Conrad*, 47 U.S. (6 How.) 201, 203 (1848); cf. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477-485 (1975) (upholding this Court's jurisdiction under 28 U.S.C. 1257 to review a state appellate court judgment that remanded a case for trial or other proceedings); *ASARCO Inc.* v. *Kadish*, 109 S. Ct. 2037, 2042 (1989) (same).

setting must, accordingly, respect the "division of function which the legislature has made between the administrative body and the court of review." *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 10 (1942).

The agency action under review in this case—the "final decision" of the Secretary (rendered through the ALJ and Appeals Council) on respondent's claim for benefits—was itself the end product of distinct adjudicatory proceedings, and it embodied the Social Security Administration's considered judgment on all issues of fact and law bearing on respondent's claim for benefits. When a court holds such a decision unlawful, the agency is immediately aggrieved, whether or not the court remands the cause to the agency for further proceedings. Due respect for a coordinate Branch—and for its formal and considered decisions—calls for the agency to have a correspondingly immediate right of appeal, so it may seek reinstatement, affirmance, and effectuation of its decision.[27] Standards of finality under 28 U.S.C. 1291,

[27] The Secretary's right to appeal the district court order at issue here is consistent with the origins of judicial review of agency action and the various procedures available for obtaining it. Judicial review is most firmly rooted in the common law writ of mandamus, by which a court could compel an executive officer to perform a duty. See L. Jaffe, *Judicial Control of Administrative Action* 176-192, 320-326 (1965); see, *e.g.*, *Kendall* v. *United States*, 37 U.S. (12 Pet.) 524 (1838). There is little doubt that an order granting a writ of mandamus is immediately appealable, see *Columbia Insurance Co.* v. *Wheelwright*, 20 U.S. (7 Wheat.) 534 (1822), even if compliance by the officer requires performance of administrative duties similar to those conducted on "remand" under more modern and familiar forms of judicial review.

The district court order at issue here also closely resembles—and indeed had the effect of—an injunction, which is subject to immediate appeal even at an interlocutory stage of the proceedings. 28 U.S.C. 1292(a)(1). The order did more than simply remand the cause; it "directed" the Secretary to conduct further proceedings to inquire whether respondent can engage in any gainful activity (Pet. App. 18a). Cf. *Avery* v. *Secretary of HHS*, 762 F.2d 158, 160-161 (1st Cir. 1985) (class action). The order did not simply

as applied in conjunction with principles of judicial review of agency action, require that result as well: the district court's order in this case is appealable both because it terminates the proceedings for judicial review of the particular decision of the Secretary, and because recognition of the Secretary's right of appeal is consistent with the principles of practical finality underlying the collateral order doctrine and the Court's holdings in related contexts.

1. The subject of an action for judicial review under 42 U.S.C. 405(g) is the "final decision" of the Secretary that the plaintiff has "complained of," not the claim for benefits that was disposed of by the Secretary's decision. See pages 15-16, 20, *supra*. The Administrative Procedure Act (APA) embodies a similar principle with respect to judicial review of agency action generally. The APA, like 42 U.S.C. 405(g), does not create an ordinary cause of action in which all relevant proceedings concerning rates, licenses, benefit claims, rules, and other matters within the jurisdiction of an Executive Branch agency are conducted by the court itself as an original matter. The APA only affords a right to judicial review of "agency action" regarding those matters. 5 U.S.C. 702. In defining the scope of review, the APA states that "[t]he reviewing court shall * * * hold unlawful and set aside agency action, findings and conclusions" that fail to satisfy the standards specified in the APA itself. 5 U.S.C. 706(2). It does not grant the courts authority to reach and decide the merits of the controversy underlying the agency action that has been set aside. *Camp*

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govern the conduct of the parties in connection with proceedings before the district court itself on matters unrelated to substantive issues in the case. See *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 108 S. Ct. 1133, 1138 (1988). Rather, it granted partial relief on the merits (by reversing the Secretary's decision insofar as it denied benefits in reliance on the Listing) and ordered further proceedings in a different forum. Compare *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 183 (1955).

v. *Pitts*, 411 U.S. 138, 142 (1973). See also *Burlington Northern, Inc.* v. *United States*, 459 U.S. 131, 141 (1982) ("federal court authority to reject Commission rate orders for whatever reason extends to the orders alone, and not to the rates themselves").

Consistent with this limited scope of judicial review, the Court has repeatedly held in a variety of administrative law settings that "the function of the reviewing court ends when an error of law is laid bare," because "[a]t that point the matter once more goes to the [agency] for reconsideration." *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952); accord *FPC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 793 n.15 (1978); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940); *ICC* v. *Clyde S.S. Co.*, 181 U.S. 29, 32-33 (1901). A district court order faithful to this command therefore "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Van Cauwenberghe* v. *Biard*, 108 S. Ct. at 1949 (citation omitted). Accordingly, general principles of administrative law under the APA and of finality under 28 U.S.C. 1291 reinforce the conclusion evident from the text of 42 U.S.C. 405(g) standing alone—that the district court's order in this case was a "final decision" for purposes of 28 U.S.C. 1291 because it finally determined that the particular decision of the Secretary before the court on review was contrary to law.

If respondent's claim is again denied on remand and she seeks judicial review of that new decision, the district court may have occasion to consider issues bearing on respondent's claim for benefits again at a later date. But there can be no assurance that events will unfold in that manner. For one thing, respondent may be awarded benefits on remand under the legal standards mandated by the district court. And even if respondent's claim is again denied and she seeks judicial review of that denial, the focus of the judicial proceedings at that point will be on the validity of the Secretary's *second* decision, not the

first (which the court previously held unlawful); nor will it focus on respondent's underlying monetary claim for benefits. Any subsequent judicial proceedings will therefore be, in substance, a new civil action for judicial review under 42 U.S.C. 405(g). And the result would be no different if the district court, as a matter of judicial convenience, sought to keep the action open or even to "retain jurisdiction" so that any request by respondent for judicial review of the Secretary's new decision on remand would be treated as part of the prior action.[28] The particular form in which a court chooses to dispose of a case under 42 U.S.C. 405(g) and similar statutes cannot control the rights of the parties. Appealability under 28 U.S.C. 1291 is defined "in terms of categories," *Carroll* v. *United States*, 354 U.S. 394, 405 (1957), and "operational consistency and predictability in the overall operation of § 1291" require a "uniform rule." *Budinich v. Becton Dickinson & Co.*, 486 U.S. at 202. Under 42 U.S.C. 405(g), as well as general principles of administrative law, the category of judicial orders that hold agency action unlawful and set it aside end the relevant litigation for purposes of appeal. This is so even if the court then remands the matter to the agency for further proceedings, because in that event, the Secretary is "'effectively out of court.'" *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. at 9, 10 (quoting *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. at 715 n.2).

2. The Secretary's right to appeal remains clear even if the proceedings before the Secretary and those before the court are regarded as separate chapters in the

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[28] The district court's order in this case does not manifest any such intent. Pet. App. 25a. See *NLRB* v. *Wilder Mfg. Co.*, 454 F.2d 995, 998 (D.C. Cir. 1971) (unless court otherwise states, remand relinquishes jurisdiction); *Chemical Leaman Tank Lines, Inc.* v. *United States*, 446 F. Supp. at 724 (same); see note 19, *supra*.

broader controversy over respondent's underlying claim for benefits. Viewed from that perspective, the district court's order is appealable by reference to the factors the Court has articulated in fashioning the "collateral order" doctrine. Specifically, the district court's order has the requisite "indicia of finality" (*Brown Shoe Co.* v. *United States*, 370 U.S. at 308) because (i) it finally resolves the important legal issue of the validity of the Secretary's regulations governing surviving spouses' disability claims; (ii) that issue is separate from the factual issues (concerning respondent's residual functional capacity to perform gainful activity) that will be considered in the administrative proceedings ordered by the court; and (iii) there is no readily available and effective opportunity for the Secretary to challenge the court's invalidation of his regulatory approach at a later date.

a. In elaborating upon the collateral order doctrine, the Court has explained that the requirement of finality avoids the disruption of on-going proceedings in the trial court that would be occasioned by "piecemeal appellate review," and thereby promotes the "efficient administration of justice." *Flanagan* v. *United States*, 465 U.S. 259, 264 (1984). In addition, the rule "emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial," thereby respecting the "independence of the district judge, as well as the special role that individual plays in our judicial system." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981).

The weight of these considerations is different in the context of judicial review of agency action. Because the order in this case constitutes a final rejection of the Secretary's reliance on the Listing as a basis for rejecting respondent's claim—and because the rehearing mandated by the district court will take place before the Secretary, not the court—the Secretary's appeal of the district court's order does not interfere with any on-going pro-

ceedings in the district court or undermine the independence or special role of the district judge. Conversely, a refusal to allow the Secretary to appeal the order invalidating his longstanding regulatory requirement *would* undermine the special role and distinct responsibilities of the Secretary, the Executive Branch officer in whom Congress has vested the primary responsibility for implementing the Social Security Act. Such a refusal also would impose an unwarranted burden on an "already overburdened agency" (*Heckler* v. *Campbell*, 461 U.S. at 468) because it would require the Secretary to conduct additional proceedings that are both unnecessary and wasteful of scarce resources if (as the Secretary firmly believes) the regulations governing surviving spouses' disability claims are valid. See *Occidental Petroleum Corp.* v. *SEC*, 873 F.2d 325, 329 (D.C. Cir. 1989); *Stone* v. *Heckler*, 722 F.2d 464, 467 (9th Cir. 1983).

The governmental and public interests favoring a right to an immediate appeal extend well beyond this particular claim, because the Secretary, claimants generally, and the public would be served by prompt appellate resolution of the validity of longstanding regulations governing the adjudication of thousands of claims annually.[29] The

[29] These regulations have become the subject of numerous challenges in the district courts in recent years, and the Secretary has taken appeals from a number of district court decisions that held the Listing requirement unlawful and remanded the cause to the Secretary. See *Kier* v. *Secretary of HHS*, No. H-85-830 (JAC) (D. Conn. Feb. 27, 1989), aff'd, 888 F.2d 244 (2d Cir. 1989); *Haywood* v. *Bowen*, No. A-85-CV-296 (W.D. Tex. Feb. 19, 1988), appeal dismissed, No. 88-1280 (5th Cir. Nov. 30, 1988) (862 F.2d 873 (Table)); *Edmond* v. *HHS*, No. C87-2132 (N.D. Ohio Dec. 20, 1988), appeal pending, No. 89-3161 (6th Cir.) (order finding jurisdiction dated Apr. 19, 1989); *Davidson* v. *Bowen*, No. CIV-85-0420-C (D.N.M. Jan. 25, 1988), appeal pending, No. 88-1472 (10th Cir.) (order making preliminary determination of jurisdiction dated Oct. 12, 1989).

interests favoring appeal also extend far beyond the Social Security disability program: "operational consistency and predictability" require a "uniform rule" governing the appealability of district court orders holding agency action unlawful and remanding for further proceedings. *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. at 202. In many areas of regulatory, ratemaking, and other administrative activity, the agency action may involve an important rule or implicate an important policy of broad application in the conduct of private affairs. The uncertainty occasioned by a lower court's invalidation of such a rule or policy would pose special difficulties for an agency if it was forced in all instances to develop new evidence and assess alternative measures under the requirements of the court's remand order, with only the possibility that a second action for review might lead to a definitive ruling from an appellate court on the validity of the agency's original approach.[30] Thus, recognition of an agency's right to appeal an order such as that at issue here will promote, not undermine, the "efficient administration of justice" (*Flanagan* v. *United States*, 465 U.S. at 264).[31]

b. The Secretary's right of appeal is further illuminated by consideration of the three factors the Court has

[30] Three recent commentaries furnish instructive accounts of the adverse consequences of several rulings by the Federal Circuit dismissing appeals from the Court of International Trade that invalidated decisions of the Department of Commerce and remanded to the Department for further proceedings (*Cabot Corp.* v. *United States*, 788 F.2d 1539, 1542 (Fed. Cir. 1986); *Badger-Powhatan* v. *United States*, 808 F.2d 823 (Fed. Cir. 1986)). See Hunter & McInerney, *What Happens When the Court Reverses a Dumping or Countervailing Duty Case? What Should Happen?*, 3 Fla. Int'l L.J. 151 (1988); Layton, *Interlocutory Appeal of Remand Orders by the Court of International Trade Under 28 U.S.C. § 1292(d)(1)*, 3 Fla. Int'l L.J. 167 (1988); Horgan, *The Impact of Interlocutory Judicial Decisions Upon Anti-Dumping and Countervailing Duty Proceedings*, 3 Fla. Int'l L.J. 187 (1988).

[31] We do not perceive any risk that the courts will be flooded with such appeals by the government, any more than they have been to date, in view of the rigorous review required before the Solicitor

identified in applying the collateral order doctrine. First, it is undisputed that the district court has "conclusively determine[d] a disputed question" concerning the validity of the Secretary's regulatory approach to the evaluation of claims for surviving spouse's disability benefits. *Coopers & Lybrand* v. *Livesay*, 437 U.S. at 468.

As to the second factor, respondent argues that the district court's order is not appealable because the issue it resolves is not "completely separate" from the merits of her claim for benefits. Br. in Opp. 18-19, 20-21 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. at 468). But respondent disregards the significant legal and practical distinctions, for appealability purposes, between an order remanding a matter to an agency for a new round of administrative proceedings and an order entered in the middle of on-going proceedings in the district court itself. The district court order at issue here removed all matters concerning respondent's claim for benefits from the immediate cognizance of the court and returned them to the jurisdiction of the officer of a coordinate Branch. As this Court has observed (*FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940)):

General authorizes an appeal. See *United States* v. *Mendoza*, 464 U.S. 154, 160-161 (1984). Statistics maintained by HHS show that appeals were taken by the Secretary in only 65 cases under Titles II and XVI of the Social Security Act in fiscal year 1986, 44 cases in 1987, and a combined total of 60 cases in 1988 and 1989. These cases represented only a small percentage of decisions adverse to the Secretary. In fiscal year 1988, for example, district courts reversed the Secretary's decision in 2255 cases (while affirming in 4700). Social Security Administration, *1989 Annual Report to the Congress*, at 34, Table 1. Reversals of the Secretary's decisions exceeded 2000 in preceding years as well. See *1988 Annual Report to the Congress*, at 23; *1987 Annual Report to Congress*, at 33. SSA's *Annual Reports* do not include statistics on how many cases were actually remanded by district courts in each year. However, the *1989 Annual Report* does state that during fiscal year 1988, SSA processed 5840 cases that previously had been remanded by a district court. *Id.*, Table 1, note 1. We have been informed by HHS that this total includes all types of remands.

> A review by a federal court of the action of a lower court is only one phase of a single unified process. * * * The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of "judicial power" conferred by Congress under the Constitution.

The second factor in the *Coopers & Lybrand* test, like the first, is designed to prevent an appeal before all related legal and factual issues have been fully developed and resolved at trial; if the legal issue addressed by the district court's order is separate, there is much less chance that subsequent developments at trial will cast new light on the issue or prompt the court to reconsider it. In the instant case, there will be *no* further development of legal or factual issues by the district court, since the further proceedings ordered by that court will be conducted in an administrative forum. Moreover, because any deviation by the Secretary from the legal standard imposed by the district court's remand order would itself be legal error (*Sullivan* v. *Hudson*, 109 S. Ct. at 2254), the validity of the surviving spouse's disability regulations will not be open for consideration in the administrative proceedings on remand (or, presumably, in any future proceedings in the district court on judicial review of the Secretary's new decision). See *Cohen* v. *Perales*, 412 F.2d at 48. Thus, the very nature of judicial review of agency action—and of an order remanding a matter to the agency for further proceedings under a different legal standard—ensures that the legal issue resolved by the court's order will be separate from the issues open for resolution on remand to the Secretary. Compare *Mitchell* v. *Forsyth*, 472 U.S. at 527-528.[32]

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[32] Cf. *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. at 199: "A question remaining to be decided after an order ending litigation

With respect to the third *Coopers & Lybrand* factor, respondent asserts (Br. in Opp. 28-36) that the Secretary should not be permitted to take an appeal now because appellate consideration of the validity of the surviving spouse's disability regulations might not be entirely foreclosed following the remand, and that the issue is therefore not "effectively unreviewable on appeal from a final judgment." 437 U.S. at 468. There can be no assurance, however, that further judicial proceedings of substance in the district court will follow the remand. It may be, for example, that the factual record before the ALJ and Appeals Council on remand will require them to find respondent disabled and to award her benefits under the legal standards imposed by the district court. Section 405(g) does not afford the Secretary a right to seek judicial review of such a decision in favor of the claimant by an ALJ or the Appeals Council.[33] And if, for this or

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on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order."

[33] In 1959, Harold Packer, the officer of the Department of Health, Education, and Welfare who was responsible for Social Security litigation matters, expressed this view of the statutory scheme in his testimony during the first extensive oversight hearings concerning the Title II disability program:

> Mr. METCALF. Is there ever an instance when the Department takes an appeal to the court?
>
> Mr. PACKER. No, there cannot be in a title II case. There cannot be any appeal by the Department because the decision rendered by the Appeals Council is the decision of the Secretary. If the decision is favorable to the claimant, of course, there can be no further action. If it is adverse, it is the claimant who appeals and he becomes the plaintiff in the action and the Secretary is the defendant.
>
> Mr. METCALF. So every appeal which is taken to the court has been an appeal from a denial or adverse decision?
>
> Mr. PACKER. Yes; in the first instance, to the district court. Of course, if the district court decision is adverse to the Government, the Government then has the right to appeal further to the appellate court.

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any other reason, the matter does not return to the district court on the merits at a later date, the Secretary will not have an opportunity to seek review of the district court's ruling in the court of appeals. Indeed, the court of appeals assumed that if respondent is awarded benefits on remand, its construction of 28 U.S.C. 1291 will require the Secretary to forgo *all* opportunity for appellate review of the district court's invalidation of his regulatory requirement in this case. Pet. App. 11a.

The court of appeals nevertheless sought to justify its jurisdictional ruling by observing that " 'it is not inexorably so' " that the district court's ruling will escape appellate review. Pet. App. 9a. Presumably, the court meant that review may be available if respondent's claim is *denied* on remand. That possibility is not only speculative; it is also of little help to the Secretary, because the district court's ruling will have continuing force with respect to respondent's individual claim only if she is *awarded* benefits on remand under the legal standards mandated by the district court. Yet, it is in that very situation that further review would be unavailable to the Secretary. See *Crowder* v. *Sullivan*, No. 89-2681 (7th Cir. Mar. 5, 1990), slip op. 2. In order for a district court ruling to be effectively reviewable on appeal from a subsequent judgment of the district court within the meaning of the third *Coopers & Lybrand* factor, the party aggrieved must at least be assured that, if the other party prevails, a final judgment will be entered from which the aggrieved party can appeal.

Respondent seeks to avoid this defect in her position by suggesting (Br. in Opp. 28-33) that the Secretary may obtain court of appeals review by filing his new decision on remand with the district court, requesting the court to enter a judgment affirming that decision, and then appealing the judgment that affirms his own decision. This argument is unavailing. In the first place,

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Laws of the House Comm. on Ways & Means, 86th Cong., 1st Sess. 692 (1959).

nothing in Section 405(g) authorizes the Secretary to seek judicial review (including appellate review) of the decision of his own Appeals Council if the Council determines on remand that the claimant must be awarded benefits under the legal standards imposed by the district court. Cf. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 481.[34] As we have explained (see pages 21-23, *supra*), the sixth sentence of Section 405(g) provides for the Secretary to file his amended findings and decision with the court only where the case has been remanded for the limited purposes described in that sentence.[35]

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[34] In *Harper* v. *Bowen*, 854 F.2d 678, 681 (4th Cir. 1988), the court considered it "possible" that the Secretary might be able to obtain appellate review in this manner.

[35] Of course, where the court has remanded the cause to the Secretary for a rehearing because it has found the Secretary's first decision denying benefits to have been unlawful, it is appropriate for the Secretary to file any new decision awarding benefits with the court so that the court can consider whether attorney's fees should be awarded under the EAJA. See *Sullivan* v. *Hudson*, 109 S. Ct. at 2255.

Respondent also relies (Br. in Opp. 22-23) on the statement in *Hudson* that the "detailed provisions for the transfer of proceedings from the courts to the Secretary and for the filing of the Secretary's subsequent findings with the court suggest a degree of direct interaction between a federal court and an administrative agency alien to traditional review of agency action under the Administrative Procedure Act." 109 S. Ct. at 2254. With all respect, we submit that those provisions of the sixth sentence of Section 405(g), which are limited to interlocutory remands, are neither unusual nor alien to traditional APA review of agency action. See U.S. Dep't of Justice, *Attorney General's Report on the Administrative Procedure Act* 93 (1947) ("many statutes provide that where the reviewing court finds that the taking of new evidence would be warranted, such evidence must be presented to the agency with opportunity to modify its findings"; those provisions "continue in effect" after enactment of the APA). Such provisions appear in the Hobbs Act, 28 U.S.C. 2347(c), and in a number of other statutes. See, *e.g.*, 15 U.S.C. 45(c) (FTC); 15 U.S.C. 77i(a) (SEC); 15 U.S.C. 78y(a)(5) (SEC); 15 U.S.C. 717r (FERC); 15 U.S.C. 1394(b) (NHTSA); 29 U.S.C. 160(e) (NLRB); 29 U.S.C. 660(a) (OSHRC); 45 U.S.C. 355(f) (Railroad Retirement Board). Some of those statutes are

At the very least, nothing in Section 405(g) *requires* the Secretary to pursue the novel and awkward course suggested by respondent, and thereby to accept the burden of a remand in all cases before obtaining appellate review on a dispositive legal issue. To the contrary, the fourth and eighth sentences of Section 405(g) expressly contemplate that the Secretary may take an immediate appeal from a district court order holding the Secretary's decision legally erroneous, even though the court has remanded the cause to the Secretary for a rehearing. Respondent's proposal to postpone all appellate review until the Secretary has rendered a new decision on remand therefore fails to accord the respect due both the Act itself and the official of a coordinate Branch who is charged with its administration.

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cited in footnote 14 to the chapter on judicial review in *Social Security Hearings and Appeals*, at 130, 162.

The passage in *Social Security Hearings and Appeals* quoted by the Court in *Hudson*, 109 S. Ct. at 2254, described the version of the sixth sentence that was in effect prior to the 1980 amendments (see note 18, *supra*), and it criticized that version on the ground that it allowed courts more freedom than they had under other judicial review statutes and thereby enmeshed the courts too much in agency affairs. It was largely in response to that criticism that Congress amended the sixth sentence in 1980 to bring it into conformity with similar provisions in other statutes, and thereby to *diminish* the degree of interaction to which the Court referred in *Hudson*. See H.R. Rep. No. 100, *supra*, at 13 (quoting Center for Administrative Justice, note 18, *supra*, at 270) (a provision similar to relevant portion of amended sixth sentence "'is contained in nearly all comparable review statutes'"). Furthermore, the Committee Reports on the 1939 amendments in which Section 405(g) was enacted make clear that Congress intended to adopt judicial review provisions "similar to those made for the review of decisions of many administrative bodies." See note 14, *supra*. There is, accordingly, no basis for fashioning a special rule of appealability in Social Security cases based on the sixth sentence of Section 405(g).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 1291 provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

2. Section 205(g) of the Social Security Act, as codified at 42 U.S.C. 405(g), provides (bracketed numbers added):

> [1] Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. [2] Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principle place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. [3] As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. [4] The court shall have power to enter, upon the pleadings

and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. [5] The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. [6] The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact [illegible] his decision, or both, and shall file with the court [illegible]y such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. [7] Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. [8] The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. [9] Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

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